

Supreme Court, U.S.
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No. 96-957 (5)

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1996

MELVIN JEFFERSON, individually
and as the Administrator of the
Estate of Alberta K. Jefferson;
LEON JEFFERSON; and BENJAMIN JEFFERSON,
Petitioners,

v.

CITY OF TARRANT, ALABAMA,
Respondents.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF ALABAMA

BRIEF OF PETITIONERS

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I. QUESTION PRESENTED

Whether, when a decedent's death is alleged to have resulted from a deprivation of federal rights occurring in Alabama, the Alabama Wrongful Death Act, § 6-5-410 (Ala. 1975), governs the recovery by the representative of the decedent's estate under 42 U.S.C. § 1983?

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BRIEF OF PETITIONERS

II. OPINION BELOW

The Circuit Court of Jefferson County, Alabama did not write an opinion in this case. The opinion of the Alabama Supreme Court is reported at 682 So. 2d 29 (Ala. 1996). The opinion of the Alabama Supreme Court is reproduced in the Appendix to the Petition for Writ of Certiorari filed herein (Pet. App. A-I).

III. JURISDICTION

The Alabama Supreme Court released its opinion on July 12, 1996. Rehearing was denied by the Alabama Supreme Court on August 30, 1996. The Petition for Writ of Certiorari was filed with this Court within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257. On March 31, 1997, this Court issued an order granting the Petition for Writ of Certiorari to consider the following question:

Whether, when a decedent's death is alleged to have resulted from a deprivation of federal rights occurring in Alabama, the Alabama Wrongful Death Act, § 6-5-410 (Ala. 1975), governs the recovery by the representative of the decedent's estate under 42 U.S.C. § 1983?

IV. STATUTORY PROVISIONS INVOLVED

The statutes involved in this appeal are 42 U.S.C. § 1983, 42 U.S.C. § 1988, and Ala. Code § 6-5-410 (1975), which are reproduced in the Appendix to the Writ for Certiorari at Appendix A-II.

V. STATEMENT OF THE CASE

Petitioners, Melvin Jefferson, individually and as the Administrator of the Estate of Alberta K. Jefferson, Leon

Jefferson, and Benjamin Jefferson, sued the City of Tarrant, Alabama in the Circuit Court for Jefferson County, Alabama. The Complaint was filed on or about June 20, 1994.

A. The Underlying Action

The action arises out of a fire on December 4, 1993 at 6017 57th Street North, Tarrant City, Alabama. This address was the residence of plaintiff Benjamin Jefferson, and Alberta K. Jefferson, the decedent. Mrs. Jefferson was an elderly black woman who had both of her legs amputated as the result of diabetes, and was only able to get about by the use of a wheelchair. The fire resulted in the death of Alberta K. Jefferson.

The evidence before the trial court was that the firefighters were aware that this house was located in a predominantly black section of Tarrant, Alabama. The City of Tarrant Fire Department personnel, including the acting chief, were aware of the neighborhoods in their territory that were predominantly black, and which were predominantly white. The firefighters described the neighborhood where this fire took place as not typical for Tarrant, and "a little bit more unkempt".

The evidence before the trial court was that the City of Tarrant Fire Department did not treat black and white sections of town equally. This disparity of treatment between the predominantly black sections of town and the predominantly white sections of town, and the death of Alberta K. Jefferson, led to the filing of a claim under 42 U.S.C. § 1983 for the denial of equal protection of the laws to black citizens. Plaintiffs' claim is that a pattern and custom of denying protective services to disfavored minorities exists in the City of Tarrant, Alabama, and led to the death of Mrs. Jefferson. The denial of protective services to disfavored minorities are generally redressable by § 1983 actions. *See, Moody v. City of Hoboken*, 758 F.

Supp. 1027, 1031 (D.N.J. 1991), citing *DeShaney v. Winnebago County*, 109 S.Ct. 998 (1989) (State "may not . . . selectively deny its protective services to certain disfavored minorities without violating the equal protection clause.")

B. Proceedings Below

This lawsuit was initiated by the filing of a Complaint on June 20, 1994. One of the plaintiffs, Melvin Jefferson, brought the action both individually, and as the personal representative of the decedent, Alberta K. Jefferson. Melvin Jefferson, as the representative of Alberta K. Jefferson's estate, brought state law claims under Ala. Code §6-5-410 (1975), the Alabama Wrongful Death Act, and pursuant to 42 U.S.C. § 1983. Leon and Benjamin Jefferson, and Melvin Jefferson in his individual capacity, brought claims for intentional infliction of emotional distress, and for the Alabama common law tort of outrage.

The Circuit Court for Jefferson County, Alabama, considered a motion for summary judgment and a motion for judgment on the pleadings, together with evidentiary exhibits. This appeal arises out of the Circuit Court for Jefferson County, Alabama's ruling, and the Supreme Court of Alabama's reversal thereof, on the legal issue presented by the City of Tarrant, Alabama's Motion for Judgment on the Pleadings.

The trial court denied the City of Tarrant's Motion for Judgment on the Pleadings, but entered a Statement of the Circuit Court Judge certifying that the interlocutory order denying the Judgment on the Pleadings for the City of Tarrant, Alabama involved a controlling question of law suitable for immediate appeal pursuant to Rule 5 of the Alabama Rules of Appellate Procedure. The City of Tarrant, Alabama filed a petition for permission to appeal from the trial court's Order on July 17, 1995. On August 23, 1995, the Alabama Supreme Court entered an

order permitting the City of Tarrant, Alabama to appeal from the interlocutory order entered on July 17, 1995.

On July 13, 1996, the Alabama Supreme Court reversed the ruling of the Circuit Court for Jefferson County, Alabama, and remanded the case for further proceedings, holding that an action against a municipality under 42 U.S.C. § 1983 could not lie where a death resulted from the wrong complained of by the plaintiff. The Alabama Supreme Court in this case relied upon *Carter v. City of Birmingham*, 444 So. 2d 373 (Ala. 1983), cert. denied 467 U.S. 1211 (1984), in making its decision, and specifically rejected the holding in *Weeks v. Benton*, 649 F. Supp. 1297 (S.D. Ala. 1986), which held that the application of the Alabama Wrongful Death Act in *Carter* was inconsistent with the underlying purposes of 42 U.S.C. § 1983. The Court denied a timely filed motion for rehearing on July 30, 1996.

VI. SUMMARY OF THE ARGUMENT

This is a case brought under 42 U.S.C. § 1983 where death resulted from the constitutional deprivation complained of. The civil rights statutes, 42 U.S.C. § 1981 *et. seq.* are deficient in that they do not provide a survivorship provision. No survivorship provision is provided even though it has long been held that death is an injury that is covered by § 1983 actions.

The statutory framework of the Civil Rights Act of 1871, however, provides a method for filling this gap at 42 U.S.C. § 1988. Section 1988 provides that where the civil rights statutes (including § 1983) are deficient in the provisions necessary to furnish suitable remedies, "The common law, as modified and changed by the Constitution and statutes of the state wherein the Court having jurisdiction . . . so far as the same is not inconsistent with the laws of the United States, shall extend to and

govern the said Courts . . ." 42 U.S.C. § 1988 (emphasis added).

This Court in *Robertson v. Wegman*, 98 S.Ct. 1991 (1978) set out a test for determining whether the application of state law is inconsistent with the Constitution and statutes of the United States. That test is whether application of the state survivorship provision would be inconsistent with the federal policy underlying the cause of action. *Robertson*, 98 S.Ct. at 1991. The Court went on to hold that the two federal policies underlying § 1983 actions are compensation of injured parties, and prevention of abuses of power by those acting under color of state law. *Robertson*, 98 S.Ct. at 1995.

The Alabama Supreme Court, following the decision in *Carter v. City of Birmingham*, 444 So. 2d 373 (Ala. 1983), cert. denied 104 S.Ct. 2401 (1984), has applied the Alabama Wrongful Death Act, Ala. Code § 6-5-410 (1975) in a manner that totally eliminates § 1983 liability for municipalities when death results from the constitutional wrong. Defendant argued, and the Alabama Supreme Court agreed, that because the Alabama Wrongful Death Act provides for punitive damages only, and because the U. S. Supreme Court held in *City of Newport v. Fact Concerts, Inc.*, 101 S.Ct. 2748 (1981), that municipalities are immune from punitive damages, no § 1983 death claims can lie against Alabama municipalities.

It is obvious why this construction is inconsistent with the purposes behind § 1983. Elimination of § 1983 claims in death cases against municipalities provides neither compensation nor deterrence. Given the alternative of elimination, the only federal court to decide the question, *Weeks v. Benton*, 649 F. Supp. 1297, 1305 (S.D. Ala. 1986), held that the Alabama Wrongful Death Act should not apply in a way that would eliminate § 1983 liability for municipalities when death occurs from the deprivation, and allowed for a compensatory damages remedy.

This Court used the same reasoning in *Carlson v. Green*, 100 S.Ct. 1468 (1980). *Carlson* was a *Bivens* action on behalf of a deceased federal prisoner in Indiana. The applicable Indiana death statute, if applied, would have so limited damages as to lead for the dismissal of the action. In that case, the Court held that the federal common law should be looked to for the survival of the action where the state statute would abate the federal cause of action. *Carlson*, 100 S.Ct. at 1474.

The *Carlson* Court, citing *Robertson*, made the analogy between the federal interests to be protected in a *Bivens*-type action and a § 1983 claim. Similarly, the lower federal courts have overwhelmingly held that where the survival statute of the forum state bans or limits the remedies available to § 1983 litigants, the state survival statute is manifestly inconsistent, must be disregarded, and the federal common law looked to provide an adequate remedy. See cases cited *infra*.

The Alabama Wrongful Death Act remedy, which is what remains against a municipality if § 1983 claims are eliminated, is particularly ineffective as a deterrent, or as compensation, as it is capped by Ala. Code § 11-93-2 at \$100,000.00. In 1997, this is a less than significant remedy. However, even if the Alabama Wrongful Death Act did provide an adequate remedy, its availability has no effect on whether a § 1983 claim should abate as § 1983 claims are supplementary to any state remedies provided. Section 1983 claims provide for particularly federal remedy for constitutional incursions. *Monroe v. Pape*, 81 S.Ct. 473 (1961).

In short, the application of the Alabama Wrongful Death Act to § 1983 death claims in a way that completely insulates municipalities from the federal claim, leaving the parties with only a severely restricted state law cause of action, is inconsistent with the federal policies underlying § 1983 liability. Courts throughout the country have realized that state restrictions such as this on § 1983

claims must yield. The Alabama Supreme Court, however, has not come to this realization. The only way to bring the Alabama courts into line with the well-accepted federal authority, and with the purposes behind § 1983 liability, is by a reversal in this case.

VII. ARGUMENT

A. State Survivorship Provisions Only Apply To § 1983 Claims, If At All, By Reference To 42 U.S.C. § 1988, Which Specifically Limits The Application Of State Law.

Plaintiffs have made a claim under 42 U.S.C. § 1983 arising out of the death of Alberta K. Jefferson. The issue in this case arises out of the lack of a survival provision in § 1983. The remedy to this "gap" is provided by 42 U.S.C. § 1988 which provides that where the federal civil rights laws are deficient, "common law, as changed by the Constitution and statutes of the state wherein the Court having jurisdiction . . . shall extend to and govern . . .".¹

¹There can be little doubt that § 1983 was intended to act as a remedy where the constitutional deprivation results in death, as well as when those deprivations result in a lesser injury. The Court in *Berry v. City of Muskogee*, 900 F.2d 1489 (10th Cir. 1990), stated "The general legislative history of the 1871 Act makes clear that death was among the civil rights violations that congress is intended to remedy." *Berry*, 900 F.2d at 1501, citing *Monroe v. Pape*, 81 S.Ct. 473, 477-78 (1961). The *Berry* Court went on to quote at length from the floor debate concerning the proposed civil rights act of 1871.

While murder is stalking abroad in disguise, while whippings and lynchings and banishment have been visited upon unoffending American citizens, the local administrations have been found inadequate or unwilling to apply the proper corrective . . . If there is no remedy for this, if the rights of citizenship may be denied without redress, if the Constitution may not be enforced, if life and liberty may not be effectively protected, then, indeed, is our Government a failure, and instead of enjoying liberty regulated by

However, the applicability of state law, if it is to be applied at all, is specifically limited by the plain language of § 1988:

but in all cases where they [federal civil rights statutes] are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law . . . *so far as the same is not inconsistent with the Constitution and laws of the United States*, shall be extended to and govern said courts in the trial and disposition of the cause . . .

42 U.S.C. § 1988 (emphasis added). In *Robertson* the Court recognized the lack of a survivorship provision in § 1983 to be a case wherein the civil rights statutes are "deficient in the provisions necessary to furnish suitable remedies . . ." *Robertson*, 98 S.Ct. at 1994.

The *Robertson* court looked to state statutory law, modifying the common law, as the starting point in determining the survivability of § 1983 actions.² *Robertson*, 98 S.Ct. at 1991. The Court, however, held that the application of state survivorship statutes is significantly restrained by the plain language of § 1988. "[S]tate law **may not be applied** when it is 'inconsistent with the Constitution and laws of

law, its subjects may live only by the sufferance of lawless and exasperated conspirators.

Berry, Id., quoting Cong. Globe, 42nd Cong., 1st Sess. 236, at 374 (1871).

²While the *Robertson* Court spoke in terms of applying state survivorship law, there is no question that the question of survivorship of a § 1983 action is, ultimately, one of federal law. *Robertson*, 98 S.Ct. at 1994 ("Regardless of the source of the law applied in a particular case, however, it is clear that the ultimate rule adopted under § 1988 'is a federal rule responsive to the need whenever a federal right is impaired.'"), quoting *Moor v. County of Alameda*, 93 S.Ct. 1785, 1792 (1973).

the United States.'" *Robertson, Id.*, citing § 1988 (emphasis added).³

1. The Proper Rule Regarding The Application Of State Survivorship Provisions To § 1983 Actions Is Articulated In *Robertson v. Wegman*.

The Court in *Robertson, supra*, considering the question of inconsistency between state and federal law raised by § 1988's directive, set out a test for determining whether the application of a state survivorship provision is incon-

³The *Robertson* Court noted that § 1988's reference to the common law might be interpreted two ways: as a reference to the decisional law of the forum state, or as a reference to federal common law. *Robertson*, 98 S.Ct. at 1995, n.5. Without specifically holding that state survivorship law should be disregarded in favor of federal common law when it is found to be in conflict with federal law, the *Robertson* Court set out a test for when the state law should be disregarded, *see, Robertson*. That test, discussed *infra*, is an analysis of state survivorship law with the provision that it not be applied in a way that is inconsistent with federal law.

In *Carlson v. Green*, 100 S.Ct. 1468 (1980), the Court took the next step, holding that federal common law was to be looked to when a state survivorship provision is found to be inconsistent with the purposes behind a federal cause of action. In *Carlson*, the Court was presented with the question of whether to apply an Indiana survivorship provision which would have severely restricted the remedy available to the plaintiff in a *Bivens* action. The Court held that "whenever the relevant state survival statute would abate a *Bivens*-type action brought against defendants whose conduct results in death, the federal common law allows survival of the action." *Carlson*, 100 S.Ct. at 1474, quoting and adopting as its holding the decision below at 581 F.2d 669, 674-75 (7th Cir. 1978). The Court came to the conclusion that state survivorship provisions apply, but not to the extent that a § 1983 claim is abated where the constitutional deprivation complained of causes death. Whether the survivorship "vehicle" is labelled a limited application of the state survivorship law, or as federal common law is of little consequence. Under the *Robertson* analysis, *infra*, the claim either survives or abates according to whether the policies underlying § 1983 are met.

sistent with federal law. That test is, "whether application of state law would be inconsistent with the federal policy underlying the cause of action under consideration." *Robertson*, 98 S.Ct. at 1995, quoting *Johnson v. Railway Express Agency, Inc.*, 95 S.Ct. 1716, 1722 (1975).⁴

The *Robertson* Court held that the policies underlying § 1983 claims include "compensation of persons injured by deprivation of federal rights and prevention of abuses of power by those acting under color of state law." *Robertson*, 98 S.Ct. at 1995 (citations omitted).

The application of the Alabama Wrongful Death Act urged by Defendant would neither compensate those injured by a municipalities' deprivation of civil rights in Alabama, nor would it prevent any unlawful action by Alabama municipalities. The reason Defendant's construction would not compensate or deter is because

⁴At least two lower federal courts have broken the *Robertson* holding into a three part test for whether the state law survivorship provision should be applied. The *Berry* Court stated the *Robertson* test as follows:

Section 1988 first directs that courts look to federal law "so far as such laws are suitable to carry [the civil and criminal civil rights statutes] into effect. 42 U.S.C. § 1988. Second, if federal law is "not adapted to the object" or is "deficient in the provisions necessary to furnish suitable remedies and punish offenses," courts must consider borrowing the law of the forum state. *Id.* Third, the federal court must reject the application of the state law if it is "inconsistent with the Constitution and laws of the United States." *Id.*

Berry, 900 F.2d at 1503. Similarly, the Court in *Bass by Lewis v. Wallenstein*, 769 F.2d 1173, 1188 (7th Cir. 1985), held that § 1988 established a three-step process for the selection of the appropriate substantive law in civil rights actions. In any case, however, "If the state law is inconsistent, it must be disregarded in favor of the federal common law." *Id.* (citing *Robertson, supra*, and *Bell v. City of Milwaukee*, 746 F.2d 1207 (7th Cir. 1984)).

Defendant's construction would immunize municipalities in Alabama from § 1983 actions where death occurs as a result of the unconstitutional action. Defendant, citing *Carter*, argues that because the Alabama Wrongful Death Act provides for punitive damages only, and because the U. S. Supreme Court held in *City of Newport v. Fact Concerts, Inc.*, 101 S.Ct. 2748 (1981) that municipalities are immune from punitive damages, a § 1983 claim cannot lie against a municipality where the constitutional injury results in death.

Only one federal court has directly considered the application of the Alabama Wrongful Death Act using the *Robertson* analysis. The Court in *Weeks v. Benton*, 649 F. Supp. 1297 (S.D. Ala. 1986), squarely applied the *Robertson* decision in considering the correct application of the Alabama Wrongful Death Act in cases in which the constitutional deprivation complained of caused death. The *Weeks* Court began its analysis:

Correct analysis requires a determination of whether the application of a state statute in a particular case has the result not merely of causing the plaintiff's claim to fail, but also of undermining the policies of compensation and deterrence underlying § 1983.

Weeks, 649 F. Supp. at 1305, citing *Robertson*.

Given this analysis, it is obvious that Defendant's argument cannot be consistent with the purposes of § 1983. The *Weeks* court succinctly stated why the *Carter* application is inconsistent with federal law:

A strict application of the Alabama wrongful death statute in cases involving municipal or county liability cannot be justified under the *Robertson* court's analysis. The Alabama statute provides for the recovery only of punitive damages, but municipalities and counties are immune from these damages in actions under § 1983. Thus, the strict application of the Ala-

bama statute in such cases would result in the complete immunization of those entities from damages, at least in cases where the decedent's death resulted from their wrongful acts. Alabama municipalities and counties would know, in advance, that they would never be monetarily liable under § 1983 for acts that cause deprivations of constitutional rights as long as the victims die. The policy of deterrence of official misconduct that underlines § 1983 would obviously be severely undermined if the Alabama wrongful death statute is applied in a way that eliminates municipal and county liability in such cases. Moreover, § 1983's policy of compensating the victims of official misconduct would also be undermined.

Weeks, 649 F. Supp. at 1305.

Mindful of the goals of compensation and deterrence in a § 1983 claim, *see, Hardin v. Straub*, 490 U.S. 536, 539 (1989) (Chief goals of § 1983 action are compensation and deterrence); *Board of Regents of University of New York v. Tomanvo*, 446 U.S. 478, 488 (1980); *Owen v. City of Independence*, 445 U.S. 622, 631 (1980), the *Weeks* Court held that compensatory damages are allowable against an Alabama municipality on a § 1983 claim.

This Court therefore holds that, in actions under § 1983, where the liability of a municipality, county, or other local governmental entity is at issue, and where the alleged unconstitutional acts result in the death of the victim, the Alabama wrongful death act should be applied only to the extent that the decedent's action is permitted to survive. The wrongful death statute should not be held to foreclose the recovery of compensatory damages against the governmental entity in question, for such a result would be inconsistent with the policies underlying § 1983.

Id.

A construction that insulates Alabama municipalities from § 1983 liability in death cases is not only inconsistent with the purposes underlying § 1983, but a perverse incentive is created whereby death, under the law, is preferable to a lesser injury. If, for example, a police officer were to use unnecessary and unreasonable force in an arrest, it would be preferable under Defendant's theory for the potential plaintiff to be bludgeoned to death rather than merely maimed, for when life evaporates, the plaintiff's § 1983 claim would also. *See, Sager v. City of Woodland Park*, 543 F. Supp. 282, 296 (D. Colo. 1982) (It would be anomalous and ironic to hold that the plaintiff could seek redress if he survives, but because the deprivation caused death, the law provides no remedy "Allowing recovery for injury but denying relief for the ultimate injury - death would mean that it would be more advantageous for the tortfeasor to kill rather than to injure. Surely this cannot be the intent of the law".) Such a construction not only defies logic, but is inconsistent with a cause of action that has the stated purpose of deterring official misconduct, and compensating its victims.⁵

⁵Defendant has argued below that in *Robertson*, the Court found a Louisiana statute which allowed a § 1983 claim to evaporate was found not to be inconsistent with federal law, and therefore the holding in *Carter* should likewise not be found inconsistent. This is not true. In *Robertson*, the plaintiff died *after* the institution of the § 1983 action, and his claim abated because there was no surviving relative who could maintain the action under the Louisiana survivorship statute. This was not considered inconsistent only because the deprivation of civil rights in that case had no bearing on the death and subsequent abatement. The Court held:

A different situation might well be presented, as the District Court noted, if state law "did not provide for the survival of any tort actions" [citation omitted] or if it significantly restricted the types of actions that survive . . . We intimate no view, moreover, about whether abatement based on state

2. The Weeks Court Followed This Court's Reasoning In *Carlson v. Green*.

The *Weeks* decision follows this Court's reasoning in *Carlson v. Green*, 100 S.Ct. 1468 (1980). In *Carlson*, Plaintiff brought an action for damages under *Bivens v. Six Unknown Fed. Narcotics Agents*, 91 S.Ct. 1999 (1971), on behalf of a deceased federal prisoner in Indiana.⁶ The applicable Indiana statute, if applied, would have failed to provide damages sufficient to meet the jurisdictional limit of the federal courts, leading to dismissal of the case. The issue presented to the Court was: "Is survival of the cause of action provided by federal common law or by state statutes?" *Carlson*, 100 S.Ct. at 1471. The Court looked to the federal common law to provide for the survivorship of the cause of action.

In sum, we hold that whenever the relevant state survival statute would abate a *Bivens*-type action brought against defendants whose conduct results in death, the federal common law allows survival of the action.

Carlson, 100 S.Ct. at 1474, quoting and adopting as its own, the holding in *Carlson v. Green*, 581 F.2d 669, 675 (7th Cir. 1978).

law could be allowed in a situation in which deprivation of federal rights caused death.

Robertson, 98 S.Ct. at 1997. Contrary to Defendant's contention, *Robertson* in no way holds that state law depriving a § 1983 litigant of a cause of action arising out of said deprivation is not inconsistent with federal law and the principles underlying § 1983.

"While *Carlson* was a *Bivens* action alleging a violation of a prison inmate's Eighth Amendment proscription against cruel and unusual punishment, the Court found *Bivens* actions to serve purposes similar to § 1983 actions, and made the analogy between *Bivens* actions and § 1983 claims. *Carlson*, 100 S.Ct. at 1473, n.6., citing *Robertson*, *supra*.

The Tenth Circuit Court of Appeals in *Berry*, *supra*, recognized the analogy made to *Robertson* and § 1983 claims by the *Carlson* Court. The *Berry* Court held, as the *Carlson* Court did when deciding the survivorship of *Bivens* actions, that there must be fashioned "a federal remedy to be applied to § 1983 death cases." *Berry*, 900 F.2d at 1506, citing *Jaco v. Bloechle*, 739 F.2d 239, 245 (6th Cir. 1984) (Where survival statutes of the forum state are hostile to promoting deterrence, protection and vindication against § 1983 infringements, federal court must allow survival). Similarly, an application of the Alabama Wrongful Death Act that would insulate municipalities from § 1983 liability is hostile to the purposes of § 1983, and must be disregarded in favor of a federal survivorship remedy.

B. The Vast Weight Of Lower Court Authority Rejects State Law Limitations On § 1983 Remedies.

1. Courts Have Consistently Held That State Laws Damage Restrictions Such As Alabama's Wrongful Death Act Are To Be Disregarded When They Conflict With § 1983 Policy.

The *Weeks* analysis is well-accepted across the nation as the proper application of the *Robertson* test. The federal courts have uniformly refused to apply state wrongful death statutes in a way that would limit the remedies available to a § 1983 claimant when the deprivation complained of caused the death. In *Berry*, the Court refused to apply an Oklahoma survivorship statute that would limit damages to property loss and lost earnings between the time of injury and death. The Court held such a statute to be "clearly deficient in both its remedy and deterrent effect. *Berry*, 900 F.2d at 1504. Instead, a federal rule of survivorship providing for compensatory damages, loss of income potential, loss of consortium, and punitive damages was applied.

Similarly, in *McFadden v. Sanchez*, 710 F.2d 907 (2d Cir. 1983), cert. denied, 464 U.S. 961 (1983), the Court held that the application of a state provision in a manner that would limit the remedies available to a § 1983 litigant is inconsistent with the Constitution and laws of the United States. In *McFadden*, a § 1983 action was brought against a police officer arising out of the shooting of the plaintiff's decedent by the officer. The jury awarded punitive damages to the plaintiff. The defendant appealed, arguing that punitive damages in such cases were barred by a New York statute preventing the survival of claims for punitive damages. The Second Circuit, relying on the *Robertson* analysis, stated the following:

we have no doubt that limitations in a state survival statute have no application to a section 1983 suit brought to redress a denial of rights that caused the decedent's death. [citations omitted] To whatever extent section 1988 makes state law applicable to section 1983 actions, it does not require deterrence to a survival statute that would bar or limit the remedies available under section 1983 for unconstitutional conduct that causes death. State law that would preclude a claim for punitive damages in a case like the present one is manifestly "inconsistent" with federal law within the meaning of section 1988.

McFadden, 710 F.2d at 911. The Alabama Supreme Court's holding in *Carter* and in this case would completely immunize municipalities from § 1983 liability in death cases. Under *Carlson* and the cases cited *infra*, such a construction is "clearly deficient in both its remedy and deterrent effect", and is "manifestly inconsistent" with federal law.

The *Berry* and *McFadden* holdings have been echoed throughout the country. See, *Heath v. City of Hialeah*, 560 F. Supp. 840 (S.D. Fla. 1983) (refusing to apply Florida

statute's ban on the recovery of decedent's damages); *Sager v. City of Woodland Park*, 543 F. Supp. 282 (D. Colo. 1982) (refusing to apply restrictions on recoverable damages in Colorado statutes); *O'Connor v. Several Unknown Correctional Officers*, 523 F. Supp. 1345 (E.D. Va. 1981) (refusing to apply the Virginia wrongful death statute's bar on recovery of decedent's damages or punitive damages); *Jaco v. Bloechle*, 739 F.2d 239 (6th Cir. 1984) (Disregarded Ohio statute that would have abated cause of action as "hostile to 'the Constitution and laws of the United States'"); *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984) (held that it would be inconsistent with federal laws to limit estate of decedent to \$25,000.00 Wisconsin statutory amount in § 1983 death claim); *Bass v. Wallenstein*, 769 F.2d 1173 (7th Cir. 1985) (State law precluding recovery for loss of life inconsistent with deterrent policy of § 1983). *Linzie v. City of Columbia, Mo.*, 651 F. Supp. 740 (W.D. Mo. 1986) (Missouri prohibition of survival claim for punitive damages subverts both compensation and deterrence policies underlying § 1983); *Williams v. City of Oakland*, 915 F. Supp. 1074, 1077 (N.D. Cal. 1996) (Denial of pain and suffering damages to plaintiff in a § 1983 death case because of a California survivorship statute "would strike at the very heart of a § 1983 action). In each of these cases, the state survivorship provision that would have limited a § 1983 death claimant's damages was disregarded, and a survivorship remedy under the federal common law was applied.

These cases illustrate the well-settled principle that local forms of practice cannot defeat established federal rights. *Felder v. Casey*, 108 S.Ct. 2302 (1988). In *Felder*, a motion to dismiss was granted a municipal defendant on a § 1983 claim because the plaintiff failed to comply with Wisconsin's notice-of-claim statute. The Court held that the notice-of-claim statute could not act as a bar to a federal § 1983 action. In reaching its decision the *Felder* Court held:

Just as federal courts are constitutionally obligated to apply state law to state claims, *see Erie B. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), so too the Supremacy Clause imposes on state courts a constitutional duty "to proceed in such a manner that all the substantial rights under controlling federal law are protected."

Felder, 108 S.Ct. at 2313-14, citing *Garrett v. Moore-McCormack Co.*, 63 S.Ct. 246, 251 (1942). Similarly, if the Alabama Wrongful Death Act is applied as Defendant urges, the substantive rights of equal protection denied Mrs. Jefferson cannot be remediated.

The *Felder* Court, in refusing to allow a state notice of claim statute to abrogate an otherwise proper § 1983 claim, realized the supremacy of the federally created right in such cases:

Thus, § 1983 provides "a uniquely federal remedy against incursions . . . upon rights secured by the Constitution and laws of the Nation," *Mitchum v. Foster*, 407 U.S. 225, 239, 92 S.Ct. 2151, 2160, 32 L.Ed.2d 705 (1972), and is to be accorded "a sweep as broad as its language." *United States v. Price*, 383 U.S. 787, 801, 86 S.Ct. 1152, 1160, 16 L.Ed.2d 267 (1966).

* * *

Accordingly, we have held that a state law that immunizes government conduct otherwise subject to suit under § 1983 is preempted, even where the federal civil rights litigation takes place in state court, because the application of the state immunity law would thwart the congressional remedy.

Felder, 108 S.Ct. at 2307. The Alabama Supreme Court has refused to follow this mandate. Both *Carter* and the present case illustrate its utter disdain for the principle of supremacy articulated in *Felder*.

In the face of voluminous authority to the contrary, the Alabama Supreme Court, following *Carter*, has continued to apply the Alabama Wrongful Death Act in a way that not only limits the remedies available to a § 1983 litigant on a death claim - it eliminates the claim entirely. The Alabama Supreme Court's holding is obviously and manifestly inconsistent with the purposes underlying § 1983, and rests on an argument consistently rejected across the country. The only way to bring the Alabama Supreme Court into line with well-accepted federal authority is to reverse the decision of that Court in this case.

2. No Federal Court Has Held That A § 1983 Claim On A Death Evaporates Due To The Application Of The Alabama Wrongful Death Statute.

The *Weeks* court followed the well-reasoned line of cases cited *supra*, and held that compensatory damages should be allowed in a § 1983 death claim in Alabama, even where the state wrongful death statute does not provide such a remedy. Similarly, in *Gilmere v. City of Atlanta*, 864 F.2d 734 (11th Cir. 1989), the Eleventh Circuit recognized that an application of Alabama's Wrongful Death Act in a fashion that would eliminate § 1983 liability for municipalities is inconsistent with the purposes of § 1983:

The Alabama Wrongful Death Statute, Ala. Code § 6-5-410, provides only for assessment of punitive damages. *Carter v. City of Birmingham*, 444 So. 2d 373 (Ala. 1983), cert denied, 467 U.S. 1211, 104 S.Ct. 2401 (1984). Because this statute is inconsistent with the rule that damages in § 1983 actions are to be compensatory, reliance on the Alabama wrongful death statute would not be proper under § 1988. *See, Weeks v. Benton*, 649 F. Supp. 1297 (S.D. Ala. 1986).

Gilmere, 864 F.2d at 740, n. 7. It is clear that the federal courts passing on the issue have seen the inconsistency in applying the Alabama Wrongful Death Act to § 1983 actions.

Respondent has attempted to argue throughout this litigation that the cases of *Brown v. Morgan County*, 518 F. Supp. 661 (N.D. Ala. 1981), *James v. Murphy*, 392 F. Supp. 641 (M.D. Ala. 1975), and *Pollard v. United States*, 384 F. Supp. 304 (M.D. Ala. 1974), somehow support its position. That is simply not the case. In *James*, the Court did not pass on the question. The *James* Court held only that when a claim is made on a death in Alabama under § 1983, punitive damages must be pled. *James*, 392 F. Supp. at 646. Similarly, *Pollard*, is not on point. The holding in that case was that the state statute of limitations could act as a bar in a § 1983 case. *Pollard*, 384 F. Supp. at 307. There is no statute of limitations issue in the case at bar.

Contrary to Defendant's argument below that the federal district court in *Brown* determined the Alabama Wrongful Death Act should apply in such cases, the Court in *Brown* specifically abstained from offering an opinion on the issue *sub judice*. The *Brown* Court stated:

The court notes that, in instances where a wrongful death action is brought against a municipality under 1983 in Alabama, the result reached in this case, coupled with the recent Supreme Court opinion in *City of Newport v. Fact Concerts, Inc.*, U.S. , 101 S.Ct. 2748, 69 L.Ed.2d 619 (1981) which held that municipalities are immune from punitive damages in civil rights suits under § 1983, bars recovery for wrongful deaths caused by them in Alabama . . . Absent amendment, the court expresses no opinion on how the inconsistency would be remedied in Alabama death cases under 1983.

Brown, 518 F. Supp. at 664, n. 3. Moreover, both *James* and *Pollard* were decided before the decision in *Newport*

v. Fact Concerts, Inc. As such, there was no decision on whether the complete elimination of a § 1983 claim against a municipality would be inconsistent with the Constitution and laws of the United States. The only court to decide the issue in the case at bar, whether the Alabama Wrongful Death Act will be applied when its effect would be to totally eliminate § 1983 claims against municipalities, is *Weeks v. Benton*, 649 F. Supp. 1297 (S.D. Ala. 1986). The *Weeks* Court, as stated in the Petition for Certiorari, clearly held that "the strict application of the Alabama statute in such cases would result in the complete immunization of those entities from damages . . . [and] such a result would be inconsistent with the policies underlying § 1983. *Weeks*, 649 F. Supp. at 1305.

C. The Alabama Supreme Court's Decisions In *Carter* And The Present Case Do Not Offer An Adequate Remedy For The Victims Of Official Misconduct.

The opinion of the Alabama Supreme Court in this case, quoting *Carter*, states that the purpose of § 1983 liability is not defeated because the law does recognize an analogous cause of action under the Alabama Wrongful Death Act. This is simply not true.

The Alabama Wrongful Death Act claim in this case is wholly inadequate. It is inadequate because recovery on such state law claims against municipalities in Alabama is capped at \$100,000.00 by Ala. Code § 11-93-2 (1975). Moreover, the state wrongful death claim does not provide any of the other relief afforded successful § 1983 litigants.

In 1997, that is a less than significant remedy on a death claim. This Court in *Carlson* refused to apply an Indiana statute on a death claim in a manner that would have severely restricted the damages available. The Court affirmed the Seventh Circuit Court of Appeals' decision

that "the Indiana law, if applied, would 'subvert' 'the policy of allowing complete vindication of constitutional rights' by making it 'more advantageous for a tortfeasor to kill rather than to injure.'" *Carlson*, 100 S.Ct. at 1468, quoting the lower Court opinion, 581 F.2d at 674. Similarly, Defendant seeks to advance an application of the Alabama Wrongful Death Act that would make it more advantageous for Alabama municipalities to kill than to injure, and would totally eliminate §1983 liability for municipalities that kill in contravention of the civil rights statutes.

The *Carlson* Court did not strictly apply the Indiana statute in a way that would cause the *Bivens* action to be dismissed. Instead, the *Carlson* opinion looked to the federal common law to fashion an appropriate remedy. The lower federal courts have similarly disregarded state law survivorship provisions that would limit § 1983 remedies, and looked to the federal common law to provide a remedy. In *Berry*, *supra*, rather than apply a restrictive state statute, the Court looked to the federal common law to allow the full range of compensatory damages, including medical and burial expenses, pain and suffering before death, loss of earnings, and the victim's loss of consortium. *Berry*, 900 F.2d at 1507. Similarly, the Court in *Linzie v. City of Columbia, Mo.*, 651 F. Supp. 740 (W.D. Mo. 1986) looked to the federal common law to provide for punitive damages in a § 1983 death claim, holding that "Missouri's prohibition against a separate claim for punitive damages would subvert both the compensation and deterrence policies underlying § 1983." *Linzie*, 651 F. Supp. at 743, citing *McFadden*, 710 F.2d at 1241; *See, O'Connor v. Several Unknown Correctional Officers*, 523 F. Supp. 1345, 1349 (E.D. Va. 1981) ("Exclusion of a punitive award under the Virginia wrongful death statute is inconsistent with the § 1983 purpose of deterring this sort of conduct . . .").

An analysis of the purposes behind § 1983 actions, pursuant to *Robertson*, leads to the holding in *Carlson* that, when state statutes would abate a federal cause of action, the state statute must give way. In short:

Such restrictive state laws must give way to federal common law rules that permit recovery. In sum, in a section 1983 action, the estate may recover damages for loss of life, conscious pain and suffering experienced by the decedent prior to death, and punitive damages in a case in which the standard . . . has been satisfied

Bass by Lewis, 769 F.2d at 1190, and that:

If state law is inconsistent, it must be disregarded in favor of the federal common law

Id., at 1188, citing *Robertson*, 98 S.Ct. at 1993-95.

The Court in *Guyton v. Phillips*, 532 F. Supp. 1154, 1165 (N.D. Cal. 1981), could "find no cases where a cause of action for deprivation of civil rights did not survive when the actions giving rise to the claim were also the cause or a contributing factor to the death of the decedent." Petitioners have similarly found no such federal case. The Alabama Supreme Court stands alone in its position that the application of a state survivorship provision that totally eliminates a § 1983 claim, leaving the plaintiffs with a severely restricted state wrongful death action, and without the other remedies available to a surviving § 1983 claimant, or a § 1983 claimant in a neighboring state, is not inconsistent with the purposes of underlying § 1983.

Damages restrictions aside, the provision of a parallel state law cause of action in no way replaces the federal right to bring an action for redress of constitutional wrongs under § 1983. In *Monroe v. Pape*, 81 S.Ct. 473 (1961), a police officer against whom a § 1983 action was brought argued that said action was unnecessary because

of a similar state action. The Court rejected this argument, stating:

It is no answer that the state has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy . . .

Monroe, 81 S.Ct. at 482. As such, even if the state law remedy were not so restrictive, its availability in no way affects whether a separate § 1983 remedy is available.

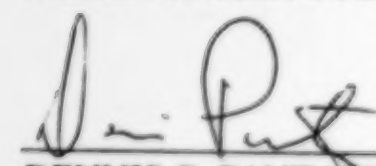
Similarly, the Court in *Williams*, *supra*, relying on *Carey v. Phipps*, 435 U.S. 245 (1978), recognized that a state law tort action may not be adequate to remediate a constitutional deprivation. In *Williams*, the issue was whether a California statute cutting off pain and suffering damages at death would be applied to a § 1983 action. In holding such an application to be inconsistent with the Constitution and laws of the United States, the Court held "to deny pain and suffering damages would strike at the very heart of a section 1983 action . . . absent such a remedy, the section 1983 action amounts to little more than a tort claim." *Williams*, 915 F. Supp. at 1077, quoting *Guyton v. Phillips*, 532 F. Supp. 1154, 1167 (N.D. Cal. 1981). Simply put, just as the *Williams* Court found it to be inconsistent not to allow pain and suffering damages in a § 1983 action because of a California limitation on tort actions, the Alabama Supreme Court's decision in this case that totally eliminates § 1983 actions in death cases - leaving litigants with only a capped tort remedy - and is wholly inconsistent with the purposes of a § 1983 action. *See, Carey*, 435 U.S. at 258 (purpose of § 1983 action defeated if injuries caused are uncompensated due to common law restrictions of "analogous" state action).

VIII. CONCLUSION

The Alabama Supreme Court has simply refused to properly apply § 1983 to death actions brought on § 1983 claims against public entities. The Alabama Supreme

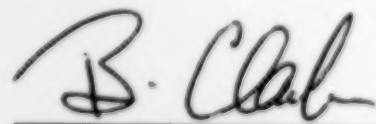
Court's application of the Alabama Wrongful Death Act in a way that totally insulates municipalities from § 1983 liability when death results from the constitutional deprivation, rather than from a lesser injury, is manifestly inconsistent with the purposes of underlying a § 1983 action. This Court, as well as numerous lower courts, has held that where a state survivorship provision would severely limit the remedies available to a plaintiff making a federal claim, the Supremacy Clause dictates that the application of state restrictions in § 1983 actions goes only so far as such restrictions do not conflict with federally granted rights and actions. Petitioner merely asks this Court to bring Alabama into line with these decisions, and to put an end to the Alabama Supreme Court's elimination of § 1983 death claims due to state procedural rules which, under the federal decisions cited herein, must yield.

RESPECTFULLY SUBMITTED,



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